Nos. 539, 540, 789 and 790.

APR 14 1924
WM. R. STANSBU
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellees.

Nos. 540 and 790.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,

Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellees.

Nos. 539 and 789.

APPEALS FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND FROM A FINAL DECREE DISMISSING THE COMPLAINT.

REPLY BRIEF OF APPELLANTS.

OTTO B. RUPP,
FRANK T. POST,
H. D. PILLSBURY,
Solicitors for Appellants.

C. M. BRACELEN,
W. V. TANNER,
Of Counsel.

Printing Pan Am Printing Office, Inc., 120 Fulton St., New York, N. Y.

SUBJECT INDEX.

ARGUMENT: PAGE

Construction of Legislative and Judicial Sections of Washington Constitution..... 2
Reluctance to Hold State Statute in Conflict with State Constitution..... 4
The Complaints are Sufficient..... 7
The Rate Provision in the Franchise of the Home Company has been Terminated..... 23

INDEX OF CASES CITED.

Barling *v.* Bank of British North America, 50 Fed. 260 8
Bellingham Bay Improvement Co. *v.* New Whatcom, 20 Wash. 53 3
Blodgett *v.* Lanyon Zinc Co., 120 Fed. 893..... 8
In re Bruen, 102 Wash. 472..... 4
Butler Bros. Shoe Co. *v.* United States Rubber Co., 156 Fed. 1 8
City of Zanesville *v.* Telephone Co., 63 Ohio St. 442 3
Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. 302 8
Dash *v.* Van Kleeck, 7 Johns. (N. Y.) 477..... 3
DeChastellux *v.* Fairchild, 3 Harris 18..... 3
Dunlop *v.* Mercer, 156 Fed. 545..... 8
Groton Bridge & Mfg. Co. *v.* American Bridge Co., 151 Fed. 871..... 8

PAGE

Kawin & Co. *v.* American Colortype Co., 243 Fed. 317 8

David Lupton's Sons *v.* Automobile Club of America, 225 U. S. 489..... 8

Minnesota Rate Cases, 230 U. S. 352..... 23

Missouri Rate Cases, 230 U. S. 474..... 23

Northern Pacific Ry. Co. *v.* North Dakota, 236 U. S. 585..... 17

Oklahoma Natural Gas Co. *v.* Russell, 261 U. S. 290 6

Prendergast *v.* New York Telephone Co., 262 U. S. 43 13

In re Sims, 54 Kan. 1..... 2

Southern Bell Tel. & Tel. Co. *v.* Railroad Comm. 280 Fed. 901..... 7

Southern Railway Co. *v.* Watts, 260 U. S. 519.... 5

Southwestern Bell Telephone Co. *v.* Public Service Comm., 262 U. S. 276..... 9

Spokane Falls Gas Light Company Case, 119 Wash. 107..... 24

State *ex rel.* Ami *v.* Superior Court, 42 Wash. 675. 7

State *ex rel.* Godard *v.* Johnson, 61 Kan. 803..... 2

State *ex rel.* Montgomery *v.* Rogers, 71 Ohio St. 203 3

State *ex rel.* Taylor *v.* Missouri-Pacific R. R. Co., 76 Kan. 467..... 2

Territory *ex rel.* Kelly *v.* Stewart, 1 Wash. 98..... 4

Thomas *v.* Birmingham Ry. Light & Power Co., 195 Fed. 340 8

Washington Public Service Commission *v.* Pacific Tel. & Tel. Co., P. U. R. 1916 D. 947, 959.... 22

Western Union Tel. Co. *v.* Myatt, 98 Fed. 335.... 2

Nos. 539, 540, 789 and 790.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1923.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.

Nos. 540 and 790.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,
Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.

Nos. 539 and 789.

APPEALS FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND FROM A FINAL DECREE DISMISSING THE COMPLAINT.

REPLY BRIEF OF APPELLANTS.

Argument.

Inasmuch as some of the questions raised by appellees were not discussed in our opening brief, we deem it appropriate to file a reply brief.

Construction of Legislative and Judicial Sections of Washington Constitution.

Counsel seek to meet our argument that section 10441 is unconstitutional because it attempts to confer a strictly legislative power upon the state courts of Washington by asserting that the Constitution of the State of Washington does not contain an express provision prohibiting the exercise by one of the departments of government of the powers of another.

It is true that the Constitution of the State of Washington does not contain such an *express* provision. But no such provision is contained in the Constitution of the United States, or in the Constitutions of the States of Kansas, New York, Ohio, Pennsylvania, North Dakota and Wisconsin. Nevertheless, it has been expressly held, in the following cases cited by us in our opening brief, that under constitutional provisions identical with that of the State of Washington, the legislative, executive and judicial powers "are as clearly separated as though the framers of the constitution had said so in terms", and that power can be "exercised only by the particular department to which it has been delegated".

Western Union Tel. Co. v. *Myatt,* 98 Fed. 335;
State ex rel. Godard v. *Johnson,* 61 Kan. 803;
In re Sims, 54 Kan. 1;
State ex rel. Taylor v. *Missouri-Pacific R. R. Co.,* 76 Kan. 467;

Dash v. *Van Kleeck,* 7 Johns. (N. Y.) 477, 508;
City of Zanesville v. *Zanesville Tel. & Tel. Co.,* 63 Ohio St. 442;
State ex. rel. Montgomery v. *Rogers,* 71 Ohio St. 203;
DeChastellux v. *Fairchild,* 3 Harris 18.

There is no authority to the contrary.

Counsel for appellees further assert that the Supreme Court of the State of Washington has held that legislative power can be conferred upon the courts of that State. They cite in support of this statement three decisions which hold that *quasi* judicial or *quasi* legislative powers may constitutionally be conferred upon administrative bodies or officers. With this proposition, of course, we have no quarrel. As said in the first case cited by counsel:

> "*Quasi* judicial powers have from *time immemorial* been conferred upon administrative bodies and officers, such as assessors, boards of county commissioners, boards of equalization, auditors, and even sheriffs, who frequently have to decide as to the value of property in cases of exemptions and in other respects."
>
> *Bellingham Bay Improvement Co.* v. *New Whatcom,* 20 Wash. 53.

But the power attempted to be conferred by Section 10441 is not *quasi* legislative; it is legislative, and it must be admitted that legislative powers have *not* from *time immemorial,* or at any time, except in Virginia and Oklahoma, been conferred upon courts.

The cases cited by counsel for appellees, therefore, are not in point.

We quote again the emphatic language used by the

Supreme Court of the State of Washington in *Territory ex rel. Kelly* v. *Stewart,* 1 Wash. 98, 110:

> "We hold that a judicial court cannot exercise legislative functions and that the *legislature cannot impose such power upon it.*"

And from *In re Bruen,* 102 Wash. 472:

> "These functions being essentially judicial and inherent in the courts, we are of the opinion that the legislature has attempted to create a judicial tribunal which, at the same time, has administrative and delegated *legislative* powers. *Such a system is not warranted under our constitutional form of government.* The legislative, executive and judicial functions have been carefully separated and, notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system."

Reluctance to Hold State Statute in Conflict with State Constitution.

This court has stated its reluctance to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state courts. Counsel cite these expressions in support of the ruling of the lower court that the companies must first seek relief in the state courts. The cases do not sustain this contention. To prevent the confiscation of their properties, the companies were entitled to resort to the United States courts as a matter of right. Questions of law necessary to the determination of the case, state as well as federal, must be disposed of by the United States courts. And, however desirable it may be that the state questions be first passed upon by the state tribunals, nevertheless the United States courts may not defer their

consideration of the case until the suitor has sought and obtained a decision of the state courts.

> "Many of the objections made raise questions as to the meaning and effect of recent statutes of the state which have not yet been construed by its courts; and we are reluctant to pass upon these questions. Some of the objections raise issues of fact on which the evidence is submitted by affidavit, and is, in certain respects, conflicting. *But in all the cases jurisdiction rests upon substantial federal questions. The objections to the validity of the legislation and of the assessments, whether arising out of the Federal Constitution or out of the constitution or statutes of the State, may be presented in a single suit. We must, therefore, determine state, as well as federal, questions.*"
>
> *Southern Railway Co.* v. *Watts*, 260 U. S. 519, 522.

But if a United States Court should be reluctant to hold that one section of a state statute is in conflict with the state Constitution before the state courts have passed upon that question, it is clear that this reluctance should extend to *all* the sections of that statute.

Counsel for appellees, however, take a most remarkable position. Though the Supreme Court of the State of Washington has, time and time again, held that legislative powers cannot be conferred upon the courts of that state, yet they urge that section 10441, which clearly does confer legislative power upon the state tribunals, should not be held unconstitutional in advance of a state decision to that effect. At the same time they ask that, despite the express and positive provisions of sections 10424 and 10429 forbidding the courts of the State of Washington to grant a stay in a case of this kind, this court should hold that the state courts have inherent power to do that which sections 10424 and 10429 *expressly forbid them to do.*

It is true that they assert that they do not wish "to be understood as absolutely taking the position that these statutes are unconstitutional" (Appellees' Brief, p. 35). But just how this court is to hold that the state courts of Washington may grant a stay to the companies, despite the express and positive provisions of sections 10424 and 10429 and not hold that these sections are unconstitutional, it is impossible to perceive.

It is true that counsel for the appellees find themselves in a dilemma. If, owing to the reluctance of this court to pass upon the constitutionality of a state statute in advance of a decision of the state tribunal, it cannot hold section 10441 invalid, it equally cannot hold sections 10424 and 10429 invalid. But if sections 10424 and 10429 are valid, then the companies cannot obtain a stay in the state courts, and the case of *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, is decisive.

Moreover, the cases cited by counsel for appellees holding that the Washington state courts have inherent power to grant a supersedeas are not in point. In no one of them was there involved a statute which contained an express provision prohibiting the court from granting a stay or supersedeas. The statutes involved in each of these cases were silent in respect to the power of the court to grant a supersedeas or stay. The cases, therefore, simply declare the power of the court to grant a supersedeas, pending an appeal to it, under express provisions of section 4, article IV of the state constitution that it shall "have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, *and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.*"

In the cases cited, therefore, the court was considering only its power to grant supersedeas in aid of its revisory and appellate jurisdiction. They are not in point here. And will counsel explain to this court just how the state

court could reach the conclusion that it possessed inherent power to suspend the order of the department without at the same time holding invalid the provisions of sections 10424 and 10429 which in express terms prohibit such action.

The Complaints are Sufficient.

A large number of objections are made to the sufficiency of the complaint in the *Pacific* case and in the *Home* case.

For instance, it is asserted that the complaint in the *Pacific* case is insufficient because it does not allege *in terms* that the company has filed a certified copy of its articles of incorporation in the office of the Secretary of State and appointed a statutory agent, which appointment must be in writing and contain certain information. But the complaint in the *Pacific* case, unlike the complaint considered in the case of *Southern Bell Tel. & Tel. Co.* v. *Railroad Commission,* 280 Fed. 901, 906, contains an allegation that the company "*has complied with all the laws of the State of Washington relating to foreign corporations*" and "has paid its annual license fee last due."

It will not be denied that a complaint filed by a foreign corporation containing such allegations would be good in the state courts of Washington.

In *State ex rel. Ami Co.* v. *Superior Court,* 42 Wash. 675, the court said:

> "In its application for the writ of review the petitioner avers that the Northern Pacific Railway Company is a corporation organized and existing under the laws of the State of Wisconsin and is authorized to do business as a foreign corporation in the State of Washington. This, of itself, shows a compliance with the statute."

Again, even assuming for the sake of argument that the precise allegations contended for by appellees are necessary if this suit had been brought in the state courts, nevertheless it is well settled that a foreign corporation may maintain an equitable suit in a United States court without any allegation whatsoever as to compliance with the laws of the state relating to foreign corporations.

David Lupton's Sons Co. v. *Automobile Club of America*, 225 U. S. 489, 500;
Groton Bridge & Mfg. Co. v. *American Bridge Co.*, 151 Fed. 871, 874;
Thomas v. *Birmingham Ry. Light & Power Co.*, 195 Fed. 340, 342;
Barling et al. v. *Bank of British North America*, 50 Fed. 260, 261;
Blodgett v. *Lanyon Zinc Co.*, 120 Fed. 893, 897;
Columbia Wire Co. v. *Freeman Wire Co.*, 71 Fed. 302, 307;
Kawin & Co. v. *American Colortype Co.*, 243 Fed. 317, 322;
Dunlop v. *Mercer*, 156 Fed. 545, 551;
Butler Bros. Shoe Co. v. *United States Rubber Co.*, 156 Fed. 1, 18.

Moreover, jurisdiction of the United States court in the *Pacific* case was invoked not only on grounds of diverse citizenship, but also on the ground that the property of the company was being confiscated in violation of the Constitution of the United States.

Another contention of appellees, if we understand it correctly, is that the complaints do not state a cause of action because it is apparent on the face of the complaint that after making of the order of March 31, 1923, the companies did not file a fair and reasonable schedule of rates with the department. It is later contended, also,

that the companies did file with the department, after March 31, 1923, schedules of rates; that these schedules were subsequently denied by the department and consequently, these entire controversies are moot.

A statement of the facts is, we think, a complete answer to this argument.

As stated in our opening brief, the companies did in September and October, 1922, file schedules of rates with the department, which rates the companies then and at all times since asserted to be just, fair and reasonable rates. The operation of these schedules was suspended by the department almost immediately upon their filing. On March 31, 1923, the department made an order finding the rates filed by the companies to be unjust, unfair, unreasonable and more than sufficient rates. It further found that the rates which were then in existence would give the companies a return of 6.01 per cent. on the cost of the properties (Tr. *Pacific* case, p. 51; *Home* case, p. 38). Parenthetically, we may say that the department obtained this result by reducing the depreciation rate of the companies from 5.75 per cent. to 3.5 per cent., and the payment made by the Pacific Company to the American Telephone and Telegraph Company and the Home Company to the Pacific Company under what is commonly called the "four and one-half per cent. contract" (see *Southwestern Bell Tel. Co.* v. *Public Service Commission*, 262 U. S. 276) from four and one-half per cent. of certain of the gross revenues of the company to 90 cents per station. These reductions, it was estimated, would amount, in the year 1923, to $603,087 for the item of depreciation and $224,517 for the item of the four and one-half per cent. contract, or a total disallowance by the department of the actual operating expenses of the companies of $827,604. (The foregoing figures are obtained from statements appearing on pages 51 and 78 of the Transcript in the *Pacific* case, and pages

38 and 66 of the Transcript in the *Home* case.) With respect to the reduction of the rate for depreciation, it was not claimed by the department that three and one-half per cent. was the proper rate to be allowed for depreciation, but it was argued that the companies' depreciation reserve was too great and that the flow into such reserve should be reduced for a period of two years (Tr. *Pacific* case, p. 46, *Home* case, p. 42).

In this connection we may say that the engineers for the department testified that the proper rate of depreciation for the companies was 5.25 per cent. per annum, and that the testimony of the engineer for the City of Seattle was that upon exchange property only the proper rate was 5.88 per cent. per annum (Tr. *Pacific* case, p. 64; *Home* case, p. 52).

Now, counsel for appellees say that "a reading of the department's order will disclose two of the principal items upon which the department and the appellants differ are depreciation and the four and one-half per cent. contract." As a matter of fact, a reading of the department's order will conclusively show that these two items and the question as to whether the cost of the property or its fair value is to be used as the base upon which the companies are entitled to earn, are the *sole* questions of controversy between the department and the companies. If the majority members of the department had allowed a proper rate for depreciation and had allowed the inescapable payments under the four and one-half per cent. contract, it is admitted that the rates continued in effect by them would have permitted an earning during the year 1923 of but 3.36 per cent. upon the *cost* of the properties. (Tr. *Pacific* case, p. 78; *Home* case, p. 66.) The department, however, as we have said, reduced the depreciation rate and refused to allow as an expense the full amount of the payments made under the four and one half per cent. contract. Having done so, it found

that the existing rates would permit a net earning in the year 1923 of 6.01 per cent. upon the *cost* of the properties and that rates which permitted such an earning upon cost were just, fair, reasonable and *sufficient* rates.

It is now asserted by counsel for appellees that when the department made this order finding the existing rates to be sufficient, the companies should have immediately filed new schedules of rates with the department. But what would it avail the companies to file new schedules with the department? The department had found that the existing schedules were just, fair, reasonable and sufficient. The department would, therefore, immediately refuse to put in operation any schedule of rates which the companies filed with it. Moreover, if the companies filed new schedules and the department denied such schedules, then under the argument of counsel for appellees the companies would still be without a schedule of rates on file with the department, and they could, therefore, not maintain suits in any court.

Nor is there anything in the contention that these cases are moot cases. The companies on April 24, 1923, filed their complaints in the United States court and applied for restraining orders. These orders were granted, but only on the condition that the companies would put into effect, pending the hearing, the schedule of rates which the dissenting member of the department had found to be just, fair and reasonable rates. Upon the making of the restraining order, and in compliance therewith, the companies filed that schedule with the department. It was distinctly stated in writing in each of the schedules so filed, that such schedule "is made effective *May 1, 1923, under the authority of an order issued April 24, 1923,* by the District Court of the United States, for the Western District of Washington, Southern Division." The department did not accept these schedules unconditionally. It stamped thereon the following: "Tariff accepted *as tendered* for filing."

On April 30, 1923, one day before these rates could become effective in any event, the restraining order was dissolved and it is clear that the dissolution of that order cancelled the filing made by the companies on April 28th. But how does the filing of a schedule of rates, in compliance with an order of a United States court, and the subsequent cancellation of such schedule resulting from the dissolution of such restraining order, make these controversies moot controversies?

On pages 57 to 77 of appellees' brief, it is urged that the complaints are fatally defective in that they are barren of allegations as to the net revenues of the companies, the detailed items "which make up fair value", the items of expense, including depreciation and the payments of the four and one-half per cent. contract, and the segregation of toll and exchange and intrastate and interstate values and revenues. Moreover, it is asserted that many of the figures stated in the complaint are incorrect.

Considering that the only controversies between the department and the companies are the questions of the amount to be allowed for depreciation, the amount of the payments allowed as an operating expense under the four and one-half per cent. contract, and the question as to whether the cost of the property or its fair value is to be used as a base upon which the companies are entitled to earn, it would seem that the complaint contained full information concerning these items and was not open to the attack made upon it.

However that may be, a more careful reading of the complaints and the exhibits attached thereto and forming a part thereof, would have shown counsel for the appellees the unsoundness of their argument.

The complaints do set forth the net earnings derived from the companies' business within the State of Washington stated in rate per cent. annual return on the cost

of its property on the one hand, and on the fair value on the other, for the years 1919, 1920, 1921 and 1922. It further alleges that the amounts by which the net revenues derived by the companies from their telephone and telegraph business in the State of Washington and in the cities of Seattle, Tacoma and Spokane, were less than eight per cent. of the cost of the property used and useful in each case in the rendition of such telephone service within said state and for the said cities, were, for each of the years 1919, 1920, 1921 and 1922 certain definitely stated sums.

It would seem that this is precisely what a complaint should contain. It is urged, however, that this is a "roundabout way of pleading net revenue". If so, this court erred in the case of *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, when it said that the complaint in that case "aptly stated the ultimate facts upon which the company asked relief omitting any mere statements of evidence". A statement like the statement contained in these complaints is found in the complaint in the *Prendergast* case, and there is contained in the complaint in that case no *direct* allegation as to net revenues expressed in dollars of the New York Telephone Company.

If, however, it be material to put in a complaint of this kind the amount *expressed in dollars* of the net revenues of a company, that amount can readily be determined by a simple arithmetical process from the figures set forth in the complaints in these cases. It is set forth in the bill of complaint that the net earnings for the year 1922 on the cost of the plant were, for the State of Washington, 3.17 per cent., for the City of Seattle .19 per cent. and for Tacoma .89 per cent., and that these earnings were less than an 8 per cent. net return on the cost of the property by the following amounts:

State of Washington.....	$1,310,651
City of Seattle.....	1,192,580
City of Tacoma.....	202,121

The difference between 3.17 per cent. and 8 per cent. is 4.83 per cent. Consequently $1,310,651 represents a net return of 4.83 per cent. on the cost of the property of the Pacific Company in the year 1922. But if a net return of 4.83 per cent. on the cost is $1,310,651, then a net return of 3.17 per cent. on cost is $860,918. The net return, therefore, of the Pacific Company in the year 1922 was $860,918 which stated in rate per cent. annual net return on cost is 3.17 per cent.

A like computation will show that the net revenue for the City of Seattle in the year 1922 was $29,013 and for the City of Tacoma, $25,301.

In like manner the net revenues of the Pacific Company can be obtained for the years 1919, 1920, and 1921, and the net revenues of the Home Company for the years 1919, 1920, 1921 and 1922.

Nor are the figures used in the complaint open to the attack made upon them on pages 58, 59 and 60 of brief of appellees. A *slight* consideration of the order of the department, which appellees are presumed to defend, but which they are apparently themselves attacking on pages 60 to 62 of their brief, would have demonstrated the error into which counsel have fallen. It is asserted that in *estimating* the net return for the year 1923 a rate base was used by the department of $34,789,635; that this rate base corresponds to the figures alleged in the complaints as to the cost of the property as of *December 31, 1922;* that the cost of the Pacific Company property as of December 31, 1922, was $29,347,254 and the cost of the Home Company property as of that date was $4,266,899, or a total *as of that date* of $33,614,153. It is, therefore, asserted that the department used as a rate base in determining the estimated net return for the year 1923 an amount which was $1,175,482 *in excess* of the cost figure pleaded by the plaintiffs. But the rate base used by the department in estimating the net return for the *entire year*

1923 is *not* the cost of the property as of *December 31, 1922.* It is distinctly stated in the order of the department that the rate base to-wit: $34,789,635, is the *"estimated average* plant value *for the year 1923,* plus working capital" (Tr. *Pacific* case, p. 51). Now it is true that in fixing a rate base the department considers value and cost as synonymous terms, and consequently the companies' cost figures and the department's value figures will coincide if the companies' cost figures and the department's value figures relate *to the same date.*

But the figures for *December 31, 1922,* and the figures for the *year 1923* cannot coincide unless there has been absolutely no change in the physical properties during the entire year 1923. What the department did and what counsel has failed to notice is that the department added to the cost of the properties as of December 31, 1922, *i. e.,* $33,614,153, one-half of the *estimated* net additions and betterments *to be* made to the properties in the year 1923. How could the department on March 31, 1923, determine with mathematical precision the average plant value for the whole year 1923.

Surely the words "estimated" and "average" ought to have prevented counsel from making so obvious an error.

Again, on page 59 counsel fall into the same error by attempting to apply the percentage of net earnings, given *for the year* 1922 in the complaint, to the plant figures as of *December 31, 1922,* in order to get the net revenue for the year 1922. Because of this obviously incorrect application, a result different from the figures in the complaint is obtained. Our net earnings are, of course, computed on the *average* plant value or average plant cost for the year 1922 and if these figures had been used by counsel the differences found by them would have disappeared.

Nor is there anything in the contention that the complaint is defective in that it fails to segregate toll and

exchange, and inter- and intra-state values, revenues and expenses.

With respect to the first—segregation of toll and exchange—a statement of the scope and character of the department's investigation, and of the order under complaint will, in our opinion, effectually dispose of the contention. In October, 1921, two civic organizations petitioned the department to investigate and revise the company's rates (Tr. *Pacific* case, p. 38). The department advised these petitioners that "*an investigation and study of the entire system of the Pacific Telephone & Telegraph Company in the State of Washington*" would be necessary, and that "the department would proceed to that end" (Tr. *Pacific* case, p. 38). The department did proceed to investigate "the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company" (Tr. *Pacific* case, p. 38). "The department's engineering and accounting staff was forthwith directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, *a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the department*" (Tr. *Pacific* case, pp. 38-9).

The full history of the proceeding appears in the record at pages 38-40. An examination of the department's "Findings of Fact", beginning at page 40, will disclose that it was dealing with each company's entire property, revenues and expenses *within the State of Washington*. Toll rates throughout the state were directly involved, and exchange (*i. e.*, local) rates for Seattle, Tacoma, and Spokane—which three exchanges together constitute 71% of the entire property and business within the state—were likewise directly involved; but the financial result for the state as a whole upon the

entire business within the state was also involved. The department was under the legal duty of prescribing just and reasonable rates. What it did was to deny the companies any increases whatever and to prescribe the existing rates without change. The bill alleges in due form that these rates prevent the company from earning a fair return on the fair value of the property devoted to the service within the state. The only purpose of segregating the exchange property and business would be to show confiscation with respect to it separately; likewise as to the toll. But we were not obliged to do that, under well settled principles repeatedly announced by this court, although we might have done so if we had so elected. (*Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585). *The point is that under the department's order complained of the companies cannot earn a fair return on their property.*

The second contention above referred to is that the averments in the bill showing confiscation are insufficient to state a cause of action, upon the idea that the company has some amount of interstate property and business in the State of Washington, and that the court must take judicial notice that this is so in the face of the fact that there is nothing anywhere in the record to show it. In other words, what appellants ask the court to do is to go outside the record and import an alleged fact into the case and thereby impeach a bill that is good on its face and on the face of the record. Even upon the assumption that the court can, or will, do this, which we do not believe to be the law, a consideration of other facts we shall presently call attention to demonstrates that the point is not well taken. Before discussing the matter in that aspect, however, we call attention to the averments of the bill in this respect.

The point does not arise in the case of the Home Telephone and Telegraph Company of Spokane, which is

purely a local exchange company, as pointed out hereinafter. We now refer, therefore, to the case of the Pacific Company, Case No. 540. The bill is printed in the record in that case at pages 1 to 9, inclusive, to which the order complained of is attached as an exhibit, appearing at pages 38 to 90.

In Paragraph III, page 2, the bill alleges that plaintiff seeks to enjoin the enforcement of the order entered on March 31, 1923, "which said order prescribes the maximum rates and charges to be charged by plaintiff for telephone service in the State of Washington, for the reason that *said rates and charges are confiscatory of plaintiff's property used or useful in furnishing said service to the public.*" The rates and charges are for intrastate telephone service exclusively, of course, those being the only rates and charges over which the state has any jurisdiction. Therefore, the property to which the averment refers is the property devoted to that service, "plaintiff's property used or useful in furnishing said service to the public". This property is largely exchange property, *i. e.,* property devoted purely to exchange or local telephone service and, to a small extent, toll property, *i. e.,* property devoted to intrastate toll service. It was with respect to that property and that service only that the department was dealing, or could deal.

In Paragraph X, on page 4, the bill alleges that the cost to plaintiff of its property in the State of Washington "now being used or useful in furnishing its telephone and telegraph service to the public therein and exclusively devoted to the rendition of that service" was the amount there stated. That paragraph of the bill shows separately also the cost of the purely local or exchange property in Seattle and Tacoma, and shows that such property in the two cities constitutes sixty-eight per cent. of plaintiff's entire property in the State of Washington. In

the same paragraph the fair and reasonable value of the same property is alleged.

In Paragraph XII, page 5, the bill shows, in terms of rate per cent. of annual return upon the cost of the property and, separately, upon its fair value, the net earnings of the plaintiff from the rates here complained of as being confiscatory, and the property referred to is that "used or useful in furnishing said service and exclusively devoted to the rendition thereof". The averments in this paragraph cover the years 1919 to 1922, inclusive, and show that the rates fall far short of anything approaching a fair return. The averments of Paragraph XIII, page 6, set forth the same facts in terms of dollars. Similar averments are made in Paragraph XIV, showing the return "upon the fair and reasonable value of *said property in said state*", etc.

In short, the averments of the bill throughout are directed against an order of the regulatory body prescribing the company's rates for telephone service *within* the State of Washington, that is intrastate toll and exchange (intrastate) rates, and on the face of the bill, the property costs and values alleged relate expressly to "plaintiff's property used or useful in furnishing *said service* to the public". The rate per cent. of actual return earned by the company under these rates complained of is a per cent. of the fair value of the same property, and so alleged. The allegation of what constitutes a fair return set forth in Paragraph XI, page 5, is a *"per cent of the fair and reasonable value of its property used or useful in the rendition of the service covered by the rates in question"*.

If we approach the matter from another angle an analysis of the averments of the bill demonstrates that it states a cause of action. In Paragraph X, on page 4 of the record, the bill alleges the cost to plaintiff, and also the fair and reasonable value, separately, of the

Pacific Company's "property in the State of Washington * * * now being used or useful in furnishing its telephone and telegraph service to the public therein, and exclusively devoted to the rendition of that service". The same paragraph sets forth the corresponding figures of cost and fair value of the company's "property constituting its Seattle Exchange and now being used and useful in furnishing telephone service therein"; and likewise the corresponding figures for the "Tacoma Exchange". This paragraph further alleges that the exchange property in the two cities of Seattle and Tacoma constitutes 68% of the total cost and of the total value of the entire property of the company in the State. This figure of 68% is of course derivable from the specific dollar figures set forth and is a mere computation for convenience.

In Paragraph XIII on page 6 the bill alleges in dollars the amount by which the rates here complained of fall short of yielding to the company 8% on the cost of the same property for each of the years 1919 to 1922 inclusive and separately with respect to the company's entire property in the state, the City of Seattle, and the City of Tacoma. These figures for the year 1922 are there pleaded as follows:

Year 1922, State of Washington.....	$1,310,651
Year 1922, City of Seattle.....	1,192,580
Year 1922, City of Tacoma.....	202,121

The sum of the deficiency attributable to the business in the two cities is $1,394,701. Subtracting from this last figure the total deficiency from the entire business leaves $84,050. That is to say, the company alleges that its property is confiscated by these rates applied to the business of the whole state (including Seattle and Tacoma) by the amount of $1,310,651, and that not only did this confiscation result entirely from the Seattle and

Tacoma rates but there remained a further deficiency of $84,050, which was made good by the business in the state outside the two cities.

These computations are based upon a rate of 8% as being a fair rate of return as alleged in Paragraph XI of the bill, but it is apparent of course that the same relation between the figures would exist if 7% or any other rate per cent. were assumed and applied.

With this foundation, we come to the point, which is that the property in Seattle and Tacoma is, and is alleged in the bill to be, *exchange property,* that is property devoted to local telephone service within those two communities, the technical word or word of art in the telephone business being "exchange". So that it appears therefore upon the face of the bill that the confiscation complained of results from the exchange rates prescribed by the Department for Seattle and Tacoma. Toll service and toll property, whether interstate or intrastate, are not involved in any way. It is true that we complain of the entire schedule prescribed by the Department for the state as a whole and allege that the effect of the entire schedule is to confiscate our property; but that we have a right to do, and that states a perfectly good cause of action—in fact states the usual confiscation case. In a suit of this kind, involving a state-wide investigation of the company's rates, and state-wide rates prescribed by regulatory order, the utility will not ordinarily be heard to complain of the insufficiency of the rates in detail, as for example the rate for a particular class of service or the rate in a particular locality. The gravamen of the complaint is that the order of the Commission has the effect of rendering the entire business within the state unprofitable to the point of confiscation. Such a case is plainly stated by the bill herein and, as we have pointed out, it plainly appears that the confiscatory result is attributable entirely to the local

rates applied to local service and local property in Seattle and Tacoma.

It appears, therefore, that if the bill be regarded within its four corners, it plainly and incontestably states a cause of action for equitable relief on the ground of confiscation.

We believe the foregoing discussion is a complete answer to this contention. There is, however, another view of the matter that seems to us decisive also.

In determining the value of the property the Department started with the value found by it in 1914. On page 41 of the record herein the department says:

> "As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922."

The 1914 value was $19,382,209 (*Public Service Commission* v. *Pacific Telephone & Telegraph Co.*, P. U. R. 1916 D, page 947, at page 959). That was a case similar to this, involving a finding of value and a rate order. In that case the commission did make a segregation of inter- and intrastate property, and *found that the interstate property constituted 13/100 of one per cent. of the entire property in the state.* The finding is as follows:

> "VI. That the relative value of the use to which such property in the state of Washington is actually put, in the conducting of interstate business and state business respectively for the year 1914, is 13/100 per cent. and 99 87/100 per cent. of respondent's entire property within the state of Washington." P. U. R. 1916 D, p. 958.

Manifestly, therefore, the interstate property and business is too small a portion of the total to affect the result, and is negligible. No doubt the department here

so regarded it and for this reason did not make the separation. That this is the probable and only reasonable explanation is further indicated by the circumstance that the state statute provides for such separation under ordinary circumstances. Section 10441, page III of the appendix, appellant's original brief herein.

The decision of this court in the *Minnesota Rate Cases* (230 U. S. 352, at page 469) is in point. We refer to the decision with respect to the Minneapolis & St. Louis Railroad Company, as to which this court held that confiscation was established, notwithstanding the failure of that company to show the value of its intrastate property. The decision in the *Missouri Rate Cases* (230 U. S. 474, at page 507) is also in point, wherein the court found that confiscation was proved in the cases of three of the railroads involved, there being no segregation of interstate and intrastate property, etc., holding "that errors attributable either to valuation or to apportionments *cannot be regarded as sufficiently great to change the result*". (Italics ours.)

With respect to the Home Company of Spokane this point cannot arise, since the property of that company is exchange or local property entirely.

The Rate Provision in the Franchise of the Home Company has been Terminated.

In a separate brief Mr. Alex M. Winston of Spokane asserts that the Home Telephone and Telegraph Company of Spokane is not entitled to relief because "it is bound by the terms of a franchise contract now existing between it and the City of Spokane for the furnishing of telephone service".

The gist of his argument in this case is admirably stated in the brief filed by him in the Supreme Court of

the State of Washington in the *Spokane Falls Gas Light Company Case,* 119 Wash. 107. In that brief he said:

> "The franchise rate being now unremunerative, the contract, therefore, as we see it, should not be entirely disregarded. It must be given some effect. Our legislature recognized this principle when it provided that such contracts, when terminated by order of the commission, 'shall be terminated by the company AS and when directed by such order' (Capitals ours). This, in our opinion, shows the intent of the legislature. It is a cardinal rule of construction that every word in an act must, if possible, be given some effect. Had it been the intention of our lawmakers to have permitted the utility, acting under the authority and order of the Commission, to wipe out, abrogate and forever set aside the terms of a franchise contract, then the word 'as' would not have been found in the act. Its presence there is, to us, a landmark, so to speak, showing that the legislature intended that effect should be given to the provisions of franchise contracts."

The court repudiated this argument saying:

> "Counsel for the city calls attention to § 34 of the act of 1911, Rem. Code, § 8626-34 (Remington's Compiled Statutes, § 10370), which says that a gas company, among others, shall not be prevented from continuing to furnish its product under any contract in force at the date the act takes effect, or upon the taking effect of any schedule of rates subsequently filed with the commission as provided by the law, at the rates fixed in such contract, provided that the commission shall have power, in its discretion, to direct by order that the contract shall be terminated by the company, and thereupon such contract shall be terminated by such company *as* and when directed by the order. Therefrom it appears to be argued that the rates provided in the contract should continue until the commission makes an order specifically declaring and directing in so many words that the contract shall be terminated. We may overlook the fact, if need be, that, upon the petition of the city, the rates were reduced in 1913, and that in

1918 they were increased upon the application of the gas company, and consider the franchise contract as having been wholly undisturbed until the present time, and still we would be compelled to determine, as we do determine, that the present order of the department of public works is just as effective as if, after fixing the rates, there had been added therein the words *'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated,'* or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material."

It is true that the Supreme Court in that case was discussing section 10370 of Remington's Compiled Statutes, but section 10370 is identical with 10379 relied upon by Mr. Winston, except that the first relates to gas companies, the second to telephone companies.

We therefore respectfully pray that the orders of the statutory court and the decrees of the District Court be reversed.

Respectfully submitted,

OTTO B. RUPP,
FRANK T. POST,
H. D. PILLSBURY,
Solicitors for Appellants.

W. V. TANNER,
C. M. BRACELEN,
Of Counsel.

25